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RECENT DEVELOPMENTS IN INTERNATIONAL ARBITRATION

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I was asked to talk about developments in international arbitration and I will try my best to do it.

So, why is it that parties agree to arbitrate? Why is it that commercial parties, and parties in investment arbitrations, agree to arbitrate? We know, of course, some of the reasons. They agree to do it because of the efficiency of the process. The arbitral process, at least aspires to be, and in many cases in my experience, is, quicker and cheaper if you look at the entire process of the alternatives in national courts. They do it because of the expertise of the decision-makers, in particular, the commercial or specialized experience in particular industries, whether it is insurance or construction or commodities or investment law. They do it because of their ability to tailor the arbitral procedures to their particular dispute. If they want a fast-track arbitration in less than six months, for example, under the SIAC Rules, they can agree to that. If they want something, for example, in investment arbitration like the Yukos dispute that takes six or seven years, they can agree to that as well, if they believe that the magnitude and importance of their dispute merits that sort of attention. Parties agree to arbitrate also because of the ultimate enforceability of the result. The New York Convention in the commercial context, and the ICSID Convention and other conventions in investment context, give to international arbitration agreements as well as arbitral awards a sort of enforceability premium. They make them better than the available alternatives being either forum selection clauses or national court judgments. There may be, at some point in the not so distant future, a competitor of sorts, such as the Hague Convention on the Choice of Court Agreements but it is a defective instrument that nobody will really join with any enthusiasm and certainly, for all of our lifetimes, will not be a realistic competitor. So when you take a step back from the world of international arbitration, both commercial and investment, one sees a variety of motivations for parties to agree to submit their dispute to resolution by arbitration.

Not surprisingly, when one looks at the statistics of arbitral institutions whether it's SIAC, the SCC or others around the world, one is able to observe, over the last 30 years, a progressive and very substantial increase in the caseloads of these arbitral institutions. One sees, in the context of investment arbitration, ICSID having gone from 0.3 cases thirty or thirty-five years ago to now a

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very hefty annual caseload. Equally, one sees arbitration being used in a wide area of new contexts, where historically the mantra was, "*oh you don't arbitrate, can't arbitrate, shouldn't arbitrate those disputes*". Those subject matters can range from sports arbitration to financial services arbitration to investment arbitration; all where arbitration has been used, for the reasons that I have outlined, to resolve new categories of disputes.

So, on one level, the world looks rosy and we should all be comfortable and secure in our chosen profession. On another level though, there are, and this is something that we would have heard on other occasions, 'clouds on the horizon' for international commercial arbitration but more specifically for international investment arbitration. What I would like to do is to take a look at a couple of those clouds, one of those clouds in particular.

Before I do that though, I would like to look backward instead of forward, backward to historical developments because I think they teach us something about possible future trends. Historically, arbitration wasn't chosen just for the reasons that I gave, namely Expedition, Expertise, Enforceability (the three 'E's). Instead, it was also chosen because it reflects something fundamental about people. It was chosen because, at bottom, people in all different parts of the world, at all different periods of time, wanted autonomy, freedom and liberty with regard to the resolution of their disputes. They wanted that no differently from wanting autonomy with respect to other aspects of their lives, whether it was choosing who to contract with, choosing who to speak to and what to say or choosing whom to marry. So, they wanted autonomy over how they resolve their disputes. Deciding how you fix a relationship is no less important than deciding whether you want to enter into it, who you want to enter it into with and what the terms of how you want to enter into it will say. So, throughout history, people have both wanted to, and, in most enlightened states, been permitted and indeed encouraged to, resolve their disputes by arbitration. This is done by private decision-makers chosen by the parties thereby affording them an opportunity to be heard before their dispute is finally resolved. That has been reflected in a variety of historical instruments. I only have time to give one example but it is one worth recalling because the sequel to that history gives us some lessons about the future. That historical event was the Constitution of Year I in the Republic of France which, in its very first articles, in addition to liberty, equality and fraternity, guaranteed the citizens' right to arbitrate. The Constitution of Year I guaranteed that nothing would infringe the right of citizens to resolve their disputes by arbitrators they chose. That reflects as I said, not something peculiarly French, although it was a French constitutional instrument, but something universal, a universal aspiration that people in all ages and all parts of the world have had in

mind. Unfortunately, in France the revolution was followed by Napoleon. The Napoleonic code had a somewhat different view of both the world and arbitration. In place of a constitutional right to arbitrate, the Napoleonic Code substituted a state centred view of legal relations and arbitration, in which the state controlled all aspects of the arbitral process, essentially making arbitration unenforceable and unworkable. For nearly a century in France, as in other continental European countries and in some common law countries such as the United States of America, from the early parts of the 19th century until the early parts of the 20th century arbitration, struggled against a state dominated vision of the world. Arbitration agreements were permitted only after the parties' dispute arose, only when the parties could identify specifically who the arbitrators would be and this is reflected in cases like the Cour de Cassation decision in *Comp. l'Alliance v. Prunier* in 1843. For all practical purposes, arbitration agreements were unenforceable.

The reason I described this historical background is that when one looks historically at international arbitration in particular, one sees a kind of cyclical process in which aspirations for private autonomy are recognized and then at other periods of time, a more statist approach towards the world reasserts itself. A sort of inevitable judicial hostility, a jealousy about turf, reasserts itself. Today, we witness something similiar, not yet in the context of international commercial arbitration, but in the context of international investment arbitration. Although I hope I am wrong about it, I suspect that the taint that threatens international investment arbitration will in due course come to stalk international commercial arbitration. All of us should be diligent and on our guard, both in making sure that what we do in the world of international arbitration is the best that we possibly can, and also against the resurrection of eras of judicial hostility.

The place where one sees this most specifically today is in the context of TTIP (the Transatlantic Trade and Investment Partnership), where the investment chapter has encountered specific opposition both to its substantive rules and, more importantly, to the use of arbitration as a means of resolving investment disputes. There what one has seen, particularly on the European continent but also in other places, including on the other side of the Atlantic, are objections to arbitration on the basis that private judges and private arbitration is a defective form of dispute resolution. That, at bottom, arbitration betrays rather than furthers the rule of law. That arbitrators chosen by the parties cannot be trusted with important disputes, and that the ability of the states to regulate and the ability of states to resolve their disputes fairly is threatened by the arbitral process. For the moment, those criticisms are directed principally at investment

arbitration. However, exactly the same sort of phrases were used with regard to commercial arbitration in the 19th century. One may well expect to hear them again in the 21st century.

What exactly are these criticisms of investment arbitration and in particular the TTIP investment chapter and its dispute resolution provisions? People like Professor Dr. Siegfried Broß, formerly a judge at the German Supreme Court, Sigmar Gabriel, the German Economics Minister and various EU officials have proposed, instead of arbitration, a sort of investment court to resolve investment disputes under TTIP. But what exactly are their criticisms, and what exactly are the responses to those criticisms? I think it is important for us to focus on them, specifically because these are criticisms that have received very substantial and surprising traction in the mainstream press, and in the mainstream political debate. They are criticisms which, for the most part, are fundamentally wrong and misconceived and I think it is important that we all speak up and speak up vocally about these criticisms. I will try to go through them quickly because I do not have the rest of the morning it would take it to do them in any detail. But let me try and summarize them and summarize what I think the right responses to them are.

The first thing that one hears, remarkably, is that investment arbitration is not a transparent process. Investment arbitrations are conducted in smoke-filled rooms by a cabal of secretive semi-mafia type representatives, often from large law firms and the process conducted behind closed doors does not permit public participation. Anyone with any experience in investment arbitration knows that those criticisms have no relevance whatsoever in today's world. Most ICSID arbitrations are conducted entirely transparently, more transparently than many national court proceedings. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration make this a treaty-based obligation going forward. Insofar as one thinks that TTIP should have different, more elaborate and more transparent rules of engagement, one is entirely free in negotiating the terms of TTIP to adopt precisely those provisions. If one thinks that participation by the public, whether in the form of *amicus arbitri* or *amicus curiae* is a desirable addition to the arbitral process, one can include that in the provisions of TTIP. There is no basis whatsoever in the current criticisms of the investment arbitration process as being non-transparent. Insofar as states want transparency, they can include that in TTIP.

Secondly, one hears arguments that arbitrators and investment arbitration are tilted in a sense towards multinational corporations. That too, when you look at the actual practice in investment arbitrations and foresee what any sensible regime under TTIP could be, is completely wrong. In fact, as in commercial arbitration, investment arbitrators are subject to very specific, very clear obligations of independence and impartiality. They are required, as we all know, to make

disclosures policed by independent arbitral institutions. In fact, ICSID is one of the arbitral institutions that is regarded by few investors as state-tilted or state-oriented. If one wants a different or better arbitral institution for TTIP disputes, one can design that very readily. One looks at who actually sits in investment arbitrations and one sees, not, as it is suggested by some continental commentators, any members of supervisory or management boards of major companies. There have been, I think, only one or two cases in which non-executive members of supervisory boards of banks or companies have sat as arbitrators in investment arbitrations. Rather, one sees, overwhelmingly, law professors, current sitting judges on the ICJ, lawyers who act for both states and for foreign investors, all subject to independence and impartiality obligations. If one wants to play with those rules or adjust those rules in the context of TTIP, in order to achieve somewhat higher or alternative obligations, one is entirely free to do that.

Occasionally, one also hears the argument that investment arbitration, and inevitably TTIP arbitrations, are tilted against states. One sees claims from commentators that investors prevail in seven out of all eight investment arbitrations and recover billions of Euros for alleged restraints on free trade. That too, is wrong. Careful academic studies have been conducted of the very substantial corpus of 500 or so investment awards available for study at this moment by professors like Professor Susan Franck in the United States. Those studies have concluded that far from prevailing in seven out of eight cases, investors in fact win in one out of three cases, and in those 33 percent of all cases often inevitably obtain substantially less than they initially claimed. The most interesting aspect of those statistics, investors prevailing in one out of three cases, is that, in fact, they lose in another one out of three of all cases and then perhaps most interestingly, the state and the investor, after arms-length negotiations, agree to consensually resolve their dispute in one out of three of all cases. This suggests to me that even states, at the height of the parties' dispute, recognize their obligations to foreign investors and are prepared to take money out of their pocket in order to compensate investors for wrongs that were done and violations of their [investors'] rights that were occasioned by the states' conduct. That is not a system that does not work. That is a system that is working in an even-handed and balanced way.

It is also suggested that investment arbitrations can lead to frivolous claims and subject the State's fisc to undue burdens of having to pay for outside law firms to defend them against these frivolous claims. However, there are mechanisms now incorporated in the ICSID rules for early dismissals of cases as well as for fee shifting, making the party that fails to prevail responsible for the other party's cost. That is hardly a surprise to all of us in the arbitral community but it seems

to be a surprise to those critics of TTIP that I have mentioned. If they like those kinds of provisions, they are free to include them in TTIP.

The reality is, and this comes now really to the focal point of the criticisms of both TTIP and investment arbitration more broadly, that the critics of investment arbitration see it as a threat to their vision of the rule of law. In fact, they do not want the rule of law. In fact, what they want is state domination, just like the Napoleonic Code, of all aspects of private life. They do not really want a TTIP investment chapter at all. They do not really want protections against expropriation or denials of justice or denials of fair and equitable treatment. They want states to be entirely free to do as they wish and to take as they want. That is not the rule of law. It is the opposite. In 1933, at the height of Nazi Germany's ascent to power, there was issued something called the Reich's Guidelines on arbitral tribunals. Those guidelines provided that the institution of arbitration was a threat to the national socialist vision of state order. Those guidelines counsel that the state and state-owned entities not conclude arbitration agreements because they undermine the state's ability to give effect to the rule of law in Nazi Germany. Unintentionally, that is the vision that the critics of TTIP embrace. That is not the vision that Germany accepted in the next 60 years. Instead, the Federal Supreme Court looked to the liberal constitution that followed World War II. It affirmed the right of the citizens to arbitrate under Article 2(1) of the German basic law, which guarantees the right of citizens to develop their personalities with autonomy. The German Supreme Court used that provision, just like the Constitution of Year I affirmed the right to arbitrate of citizens, in order to guarantee the efficacy of arbitration agreements. It is that German vision of the rule of law that ought be respected today, not the vision from 1933.

Although this is an appeal to the rule of law, there also ought to be an appeal to practical realities. TTIP is not the only game in town. There is also the Trans-Pacific Partnership (TPP). That partnership includes within it an investment chapter guaranteed by investment arbitration. Europe can decide not to join the TTIP train, with investment arbitration protecting investment of foreign investors. But, in doing so it will turn its back on the rest of the world and put itself behind a wall. We saw thirty years ago, what happens to walls. Those walls do not last. Let us hope they do not last in this case.